IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1712 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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BISMILLAKHAN MAHOMADKHAN PATHAN - Applicant(s)
Versus
STATE OF GUJARAT & 4 - Respondent(s)

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Appearance :
MR EE SAIYED for Applicant(s) : 1,
MR KT DAVE, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,3 - 4.
DS AFF.NOT FILED (N) for Respondent(s) : 2,
MR NIRAV C THAKKAR for Respondent(s) : 5,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 28/09/2007

ORAL JUDGMENT

1. By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for

an appropriate Writ, direction and/or order directing respondent No.3 – DSP, Kheda to register complaint against respondent No.2 – Mamlatdar and Executive Magistrate, Mahmdabad, District – Kheda under Section 154 of the Criminal Procedure Code ('Cr.P.C.' for short) for illegal and intentional detention of the petitioner for the period from 11.06.2007 to 18.06.2007 and it is further prayed to direct to make fair and impartial investigation either by the same Investigating Officer or by any high ranking officer in place of respondent No.4.

2. Facts leading to the present petition in nutshell are that:

As per the petitioner since 1979 land bearing Survey Nos. 110, 113, 131, 132 and 134 admeasuring 15 Acres and 38 Gunthas are in his occupation and possession and he is cultivating the same. That he removed the Neem trees produced and fallen down due to cyclone but the Revenue Officers were not satisfied. That on the report of the Talati to the effect that the petitioner is a head strong person and threatening to the employees, proceedings under Section 107 of the Cr.P.C. came to be initiated by the Mamlatdar and Executive Magistrate, Memdabad – respondent No.2 herein and Ms.Ketki Vyas,

Mamlatdar and Executive Magistrate, Memdabad passed an order on 11.06.2007 directing Senior Police Inspector, Memdabad to initiate proceeding to arrest the petitioner under Sections 107 – 151 of the Cr.P.C. That the Police arrested the petitioner on 11.06.2007 and was detained in the police custody for 24 hours and produced before the Executive Magistrate on 12.06.2007. The petitioner was transferred to Sub – Divisional Magistrate at 7.00 p.m. When the petitioner was produced before the Sub – Divisional Magistrate, the petitioner requested to release him on bail but the Sub-Divisional Magistrate passed an order to release him on bail on condition that the petitioner shall execute bond of Rs.25,000/- with the solvency surety in the like amount. It is the case on behalf of the petitioner that the petitioner again requested to release him on bail, subject to producing the solvency certificate but the said request was turned down and the petitioner was sent to the Jail at about 9.00 p.m. On 12.06.2007. Upto 16.06.2007, solvency certificate was not provided by respondent No.2. It is the case on behalf of the petitioner that respondent No.2 intentionally did not issue solvency certificate. That the petitioner preferred Criminal Revision Application No.80 of 2007 before the learned Sessions Court and the learned Additional Sessions Judge, passed an interim

order to release the petitioner on executing bail with the surety of Rs.2000/- by observing that detention of the petitioner is prima-facie illegal. It is also the case on behalf of the petitioner that when the petitioner produced order of bail, respondent No.5- Ms.Ketki Vyas, Mamlatdar and Executive Magistrate, Memdabad stated that the order of learned Sessions Court is illegal and she was not bound to comply with the same. It is the case on behalf of the petitioner that the petitioner was produced before the Sub-Divisional Magistrate with handcuffed as if he was harden criminal and was also taken back to the jail in the same condition. As the petitioner was illegally detained and the order passed by the Mamlatdar and Executive Magistrate, Mehmdabad was without jurisdiction, he approached the Mehmdabad Police Station to file complaint but the concerned Police Officer did not register the complaint and therefore, he gave written complaint dated 25.08.2007 to the D.S.P. against the said Mamlatdar and Executive Magistrate i.e. respondent No.2 for illegal detention. However, as nothing was done and on the contrary husband of respondent No.5 was posted as P.S.I. at Mehmdabad and apprehending that nothing would be done, the petitioner has preferred the present petition under Article 226 of the Constitution of India by submitting that respondent

No.2 – Mamlatdar and Executive Magistrate, Memdabad has committed offence punishable under Sections 343 and 345 of the I.P.C.

3. By order dated 10.09.2007, Ms.Ketki Vyas, Mamlatdar and Executive Magistrate, Mehmdabad was directed to be joined as respondent No.5 in her individual capacity. Thereafter, the application was heard by this Court on 27.09.2007 and this Court also directed to call for Record and Proceedings of the case from the Dy. Collector and S.D.M., Kheda as the case was subsequently transferred to Kheda and also directed to call entire Record and Proceedings of Criminal Revision Application No. 80 of 2007 from the learned Additional Sessions Judge, Kheda at Nadiad. It appears that in the meantime, complaint / FIR came to be registered against Ms.Ketki Vyas, Mamlatdar and Executive Magistrate, Mehmdabad and S.D.M., Kheda with Mehmdabad Police Station being C.R.No.I-191 of 2007 for the offence punishable under Sections 343 and 345 of the Indian Penal Code. An affidavit-in-reply is filed by respondent No.2 – Ms.Ketki Vyas, working as Mamlatdar and Executive Magistrate, Mehmdabad by submitting that in the facts and circumstances of the case, the order passed by her is just; proper and legal. The petitioner is head strong

person and threatening the Government Officers. It is further submitted that A.S.I., Mehmdabad had taken the petitioner in custody on 11.00 at about 15.00 hrs. However, he was produced before her only on 12.06.2007 and on the said production before her, the petitioner started abusing the authority of her Court and even gave his submissions in writing. He also shouted that he would not give any bail bond or surety. It is also further submitted that she took advise from the Sub-Divisional Magistrate and he telephonically instructed her to transfer the case of the petitioner to his Court. Immediately by order dated 12.06.2007, she ordered that the petitioner be produced before the Sub-Divisional Magistrate. It is also further submitted that after the production before the Sub-Divisional Magistrate, he passed an order on 12.06.2007 itself under Section 116(3) of the Code directing the petitioner to give two solvencies of Rs.25,000/- each. Such order was passed under Section 116(3) of the Code which is an order pending inquiry under Section 116(1) of the Code. It is also further submitted that said provision gives Executive Magistrate power to detain the person in custody until such bond is executed or in default of execution, until the inquiry is concluded. It is also further submitted that FIR / complaint being C.R.No.I-191

of 2007 has been registered with Mehmdabad Police Station on the insistence of the petitioner that this Court has orally directed to register the complaint. It is submitted that even the main prayer of the petitioner is to direct the D.S.P., to register the complaint, therefore, such interim order could not have been passed by this Court. It is also submitted that the order passed by her is in accordance with law.

4. This Court has heard the learned Advocates appearing on behalf of the respective parties at length. This Court has also gone through the Record and Proceedings and it appears that the proceedings came to be initiated by Ms.Ketki Vyas, Mamlatdar and Executive Magistrate, Mehmdabad on 11.06.2007 under Section 107 of the Cr.P.C. which is popularly known as Chapter Case. However, Ms.Ketki Vyas, Mamlatdar and Executive Magistrate, Mehmdabad – respondent No.2 herein in a proceedings under a Chapter Case under Section 107 of the Cr.P.C. passed an order dated 11.06.2007 directing the Senior Police Inspector, Mehmdabad to arrest / detain the petitioner under Sections 107- 151 of the Cr.P.C. Accordingly the petitioner came to be arrested on 11.06.2007. As held by the Division Bench of this Court in the case of **Divyajit Mehta v/s. S.S.Katara & Ors.**

reported in *XXIII (2) GLR 136*, proceedings under Section 107 of the Cr.P.C. are popularly known as Chapter proceedings and there is no question of any person being accused of any offence in such proceedings. The Executive Magistrate in exercise of his powers under Section 107 is not acting and could not have acted as a Judicial Magistrate. Therefore, the Executive Magistrate has obviously no power, jurisdiction or authority to direct the Police Officer to send the concerned persons to jail unless they could furnish bail. Thus considering the decision of the Division Bench of this Court in the case of Divyajit Mehta (supra) as well as relevant provisions more particularly Section 107 of the Cr.P.C., initial order passed by the Mamlatdar and Executive Magistrate on 11.06.2007 itself is illegal, without jurisdiction and authority under the law and is most arbitrary. Looking to the entire Record and Proceedings and subsequent orders passed by the Authorities right from the Mamlatdar and Executive Magistrate, Mehmdabad to Sub-Divisional Magistrate, Kheda and looking to the Record and Proceedings of the case, it appears to the Court that entire proceeding is to be inquired into by the higher authority and it is reported that the Collector, Kheda is the Superior Authority to the Mamlatdar and Executive Magistrate, Mehmedabad – respondent No.2 / respondent

No.5. The Collector, Kheda is therefore, directed to hold inquiry against respondent No.2 and other Officers, which is not objected by the learned Advocate appearing on behalf of respondent No.2 / respondent No.5. The Collector, Kheda to compete the inquiry within a period of 3(three) months from the date of receipt of this order.

5. It appears that complaint / FIR being C.R.No.I-191 of 2007 is registered with the Mehmdabad Police Station against Ms.Ketki Vyas, Mamlatdar and Executive Magistrate, Mehmdabad and S.D.M., Kheda for the offence punishable under Sections 343 and 345 of the Indian Penal Code on the assumption that this Court has passed an interim order. However, no such interim order has been passed by this Court and therefore, without further expressing any opinion on merits with regard to the same, said complaint / FIR is quashed and set aside. It will be open for the petitioner to file private complaint as contemplated under Section 190 of the Cr.P.C. As and when such complaint is filed same shall be dealt with in accordance with law and on its own merits. It also appears from the record that Criminal Revision Application No.80 of 2007 in the Court of learned Additional Sessions Judge, Nadiad is pending, therefore,

Office is directed to return Record and Proceedings to the learned Trial Court and the learned Additional Sessions Judge is directed to decide and dispose of said Criminal Revision Application in accordance with law and on its own merits. With these, present Special Criminal Application is disposed of.

[M.R.Shah, J.]

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